

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
10 EDC 2914

## FINAL DECISION

1. Whether Respondent exceeded its authority, acted erroneously, failed to use proper procedure, or failed to act as required by law or rule, and thereby denied Petitioner a free appropriate public education, by failing to implement Petitioner *Student's* IEP from XXX County Schools, and by changing Petitioner *Student's* placement from a self-contained cross-categorical classroom with an one-on-one assistant, to a separate classroom for resource with "assistance" only during transition times?
2. Whether Respondent offered Petitioner *Student* a free appropriate public education in the least restrictive environment?
3. Whether Respondent failed to implement Petitioner *Student's* Behavior Intervention Plan of *Student's* IEP, and denied *Student* a free appropriate education when Respondent suspended *Student* from school for two and one-half days for fighting on the playground?

4. Whether Respondent's policy, that prohibits a student from attending school unless the student provides proof of residency, violates N.C. Gen. Stat. § 115C-378?

### **EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioners: A – G

For Respondent: 1 - 7

### **FINDINGS OF FACT**

#### **Procedural Background**

1. On May 19, 2010, an IEP team consisting of Respondent's educators met with Parent. During this meeting, the IEP team changed Petitioner *Student's* placement from a self-contained cross-categorical classroom with a one-on-one assistant (1:1) to a separate classroom setting for resource with special education teachers. The IEP reduced the service of providing *Student* with a 1:1 assistant for the entire school day to the providing *Student* with support or assistance only during the transition times of lunch, PE, and recess. The IEP team also added to the IEP that Respondent would provide to a daily report on *Student's* behavior, via a behavior log and schedule, to Parent.

2. On May 24, 2010, Parent filed a contested case petition with the Office of Administrative Hearings requesting a due process hearing on the following issues:

- a. Respondent failed to implement *Student's* IEP from XXX County schools requiring a student assistant during the whole school day.
- b. When determining discipline for a child with disabilities, Respondent refused to consider [discipline] on a case-by-case basis.
- c. Respondent failed to recognize the unique circumstances clause of 34 CFR § 300.
- d. Respondent's policy that prohibits students from attending school as to provide proof of residency violates N.C. Gen. Stat. § 115C-378.

#### **Adjudicated Facts at Hearing**

3. Parent is a resident of Granville County, North Carolina, and is the father of Petitioner *Student*. Petitioner *Student* is eight years old. Before transferring to Respondent's school system in April 2010, Petitioner *Student* attended XYZ Elementary School at XXX County Schools during the 2009-2010 school year.

4. There is no factual dispute that under applicable state and federal law, *Student* is a child with a disability, as he is specifically categorized as Attention Deficit Hyperactivity Disorder (“ADHD”) and Oppositional Defiant Disorder (ODD). As such, *Student* is eligible for, and requires, special education and related services, including have an Individualized Education Program (“IEP”) pursuant to state and federal law.

5. Respondent Granville County Board of Education (GBOE) is the Local Education Agency (LEA) responsible for *Student*’s education. ABC Elementary School is a public school operated and maintained by Respondent. ABC is a K-5 elementary school that is considered a Title I, or “at risk” school.

6. While attending *XYZ Elementary*, *Student* had an IEP, a Behavioral Intervention Plan (“BIP”), and a Functional Behavior Analysis plan (“FBA”).

7. On April 5, 2010, *Student*’s IEP team at XXX County Schools conducted an annual review of *Student*’s IEP. The IEP team determined that *Student* would continue to be served in a self-contained cross-categorical classroom five times a week for 360 minutes, would continue to receive speech services two times a week for 30 minutes, and would receive transportation services as a related service. The IEP team found the April 8, 2009 FBA continued to be accurate, and included it in the new IEP for the 4/5/2010-4/4/2011 period. The IEP team developed a new BIP for the new IEP to focus on *Student*’s argumentative behaviors with adults and with *Student*’s outbursts. *Student*’s new BIP noted that the primary areas of behavioral concern for *Student* were:

- I. Behavior 1: [*Student*] has difficulty understanding appropriate practices of social interaction with students.
- II. Behavior 2: [*Student*] often has outbursts and can be verbally aggressive and argumentative.

The IEP also provided that XXX County Schools would provide a 1:1 assistant for the entire school day to assist *Student* with issues of communication, mutual respect, and positive behavior. (Pet Exh A)

8. On April 12, 2010, Petitioner *Student* transferred into, and enrolled at, Respondent’s ABC Elementary school. Petitioner *Student* attended ABC Elementary school for the remainder of the 2009-2010 school term. June 8, 2010 was the last day of school for Respondent’s 2009-2010 school year.

9. On May 5, 2010, Petitioner *Student* was playing football on the playground at ABC Elementary. *Student*’s assistant and Parent were talking on the other side of the playground. Petitioner *Student* grabbed another student around the neck, and started choking the student. Parent and *Student*’s assistant intervened, and *Student* reported to the principal’s office. When asked why he choked the student, *Student* repeatedly claimed he was just trying to get the football. K.T., principal at ABC Elementary, suspended Petitioner *Student* for two days for choking the student on the playground.

10. On May 19, 2010, Respondent convened an IEP team meeting to discuss transitioning *Student* into Granville County Schools, to discuss any parental concerns, to review *Student*’s current IEP/BIP, and to consider any teacher input. Principal K.T., Regular

Education teacher HC, Special Education teacher Ms. RW, Behavioral Specialist G.C., Exceptional Child's Director Ms. AM, and Parent attended the meeting.

11. Parent advised that he had not been receiving a daily report or schedule for *Student*, and wished to receive that. Parent advised that *Student* needs 1:1 services with an assistant as required by the XXX County IEP. Parent also indicated that *Student's* 2-day suspension, a few weeks before for a physical altercation on the playground, was unwarranted because of *Student's* disability. Parent thought that *Student's* assistant was not located close enough to *Student* on the playground while *Student* was playing football. Parent thought *Student* got into the physical altercation, because the assistant was not within arms reach of *Student* to stop him.

12. During the May 19, 2010 meeting, the IEP team decided to amend *Student's* IEP. Respondent explained the proposed Action on the Prior Written Notice DEC 5 as follows:

**I. The IEP team or other group of appropriate individuals decided the action stated on Page 1 because:**

*Student* is now a student in the Granville Co. School system and IEP/BIP needed review.

**II. The IEP team or other group of appropriate individuals also (Be specific):**

a. **Considered:** changing from cross-categorical to just separate setting for resource, exit transportation as related service, reduce 1:1 to support for transition times (PE, recess, lunch), daily report to father

b. **Rejected:** continuing cross-categorical class, transportation, and 1:1 all day.

**III. Describe (do not refer to) each evaluation procedure, test, record or report, used as basis for the action stated above on page 1. (Include the types of tests administered (cognitive, educational, adaptive behavior, etc.), observations, screenings, informal assessment, review of records, etc)**

Previous/current IEP completed 4-5-10. Reviewed BIP no changes made accordingly to BIP but IEP amended.

**IV. Describe (do not refer to) other factors that are relevant to the agency's proposal or refusal:**

Father requested daily behavior log and schedule. . . . Concerned with 1:1 support and wants him to be exempt from discipline "per board policy" due to mental disability. Wants 1:1 continued all day.

(Pet Exh B, DEC 5 dated May 19, 2010)

13. On July 13, 2010, Respondent and Parent, along with an attorney, attended a resolution meeting. The parties reached, and signed, an agreement resolving this contested case, whereby Petitioner *Student* would attend Respondent's alternate behavior school, known as "*the alternative school*" for a 4½ week trial placement.

a. *Student* would attend an elementary class at *the alternative school* with a certified teacher. There would be three elementary students in the class. The older students would not eat, have recess, or have any academic classes with any elementary students.

b. Academics would be addressed first, but behavioral challenges would also be addressed continually, and replacement behaviors addressed with positive behavior support. Either Director G.C. or other teachers involved with *Student's* daily activities would provide daily emails to Parent regarding *Student's* daily academics and issues. If *Student* was the only elementary student, then no TA floater would be needed. If there were other students in the classroom, then a TA floater would be assigned to the class. After the 4½-week trial period, the IEP team would meet to assess *Student's* progress, and determine *Student's* placement for after the trial period. (Pet Exh E)

14. On July 14, 2010, Petitioner withdrew his consent to the July 13, resolution.

15. At hearing, Parent described how on May 5, 2010, he and *Student's* student assistant, T.C., were talking on one end of the field or playground, while *Student* and some other kids played football on the other end of the school playground. Petitioner *Student* grabbed another boy around the neck, and started choking him. The student assistant got to *Student*, and "broke it up." *Student* repeatedly stated that he was just trying to get the ball. They brought *Student* inside, where he was questioned by the principal. *Student* kept reiterating that he was just trying to get the ball. "He didn't show any malice. He said he was sorry. He apologized. In other words, he just--he thought he was just playing." (T pp 18-19) Parent thought the incident would not have happened had the student assistant been closer to *Student*.

16. Parent first contended that *Student* should not have been suspended under Respondent's general discipline policy, as *Student's* choking of the student was due to *Student's* disability. If *Student's* behavior was due to his disability, *Student's* punishment should have been restricted to a one-day suspension as *Student's* BIP required, "Out of school suspension 1 day suspension per incident." (Petitioner Exhibit A, pg H, IV, no. 7)

17. Second, Parent explained how he did not believe *Student* should attend an alternative school, because he had not spent enough time in ABC Elementary. That is, Parent thought Respondent did not enough information to make a good determination whether *Student* should be transferred to a more restrictive environment, such as Respondent's alternative school. Parent has always tried to keep *Student* in the least restrictive environment. In the past, *Student* tried a separate alternative school in XXX County Schools, before *Student* went to XYZ Elementary, and it did not work. "It just was not a positive fit." (T p 22)

18. *Parent* further explained that the alternative school would do many things differently from a regular school. First, *Student* would be restricted from other students as he would be the only student in the elementary program. *Parent* thinks that *Student* should have a right to be around students that do not have disabilities, so he can learn how to interact with people that do not have disabilities. Second, *Student* has not exhibited any type of behavior at ABC that would cause *Student* to be located in a place where he is confined, or not visible with the general population of students. *Parent* opined that a least restrictive environment is the best thing for *Student* right now. In addition, there is no documentation on Respondent's alternative school program; there is nothing on the web about it, and nothing in writing about it as Respondent is just starting the alternative school for elementary students. The program is not even in place yet. (T pp 22-23)

19. Third, *Parent* argued that Respondent violated *Student's* rights when Respondent prohibited *Student* from attending school until he provided proof of residency. Respondent has a policy that prohibits students from attending school until the student has presented documentation showing proof of residency. When *Parent* spoke with Respondent's superintendent, the superintendent told *Parent* that either you have the documents or you do not. If you do not have them, then you just can't come. *Parent* argued that a child should not be prohibited from going to school just because that parent cannot produce the documentations at that time. They should be allowed a certain amount of time to produce documentation of residency.

20. Fourth, *Parent* opined that *Student* needs a special education tutor, not a regular tutor. They tried a regular tutor before at EFG Elementary in XXX County, and the tutor could not handle *Student* because of his behavior. It just did not work. *Parent* is asking for a tutor for *Student*, because he is going into fourth grade, but operating on a second grade level, and is behind.

21. Fifth, *Parent* explained that *Student's* teachers at ABC Elementary completed daily logs, rating *Student's* daily behavior on a scale from 1 to 5. According to these logs, *Student* behaved very well until field day, June 7, 2010. (Pet Exh F) *Parent* questioned why *Student* would need to attend an alternative school if *Student* is doing so well in school. (Tpp 25-26)

22. In November and December 2008, *Ms. J*, a licensed Psychological Associate, conducted evaluations of *Student*. In Petitioner's Exhibit F are *Ms. J's* written evaluations and suggestions for treating *Student's* disruptive behaviors, learning difficulties, and inattention problems. At hearing, *Parent* pointed out that *Ms. J* suggested that they should ignore *Student's* negative behaviors, as *Student* likes attention, and instead, focus on *Student's* positive behavior. (Pet Exh F, pp 14, no. 2)

23. On cross-examination, *Parent* agreed that during the May 5, 2010 incident at the playground, Mr. *T.C.* yelled at *Student*, but *Student* did not respond. *Parent* noted that *Student* continued saying that it was the other students' fault, and blamed the other student. *Student's* blaming the other students is one of the behavioral traits the IEP and teachers are trying to work on with *Student*. (T p 37)

24. *Parent* explained that *Student* does better with a male role model. In XXX County schools, *Student* did a whole lot better with one-on-one, as there was somebody to

help him read, somebody to help him do his math, and somebody to help him with his behavior. One of the reasons *Parent* wanted *Student* to have a 1:1 assistant during school was that a 1:1 assistant would help keep *Student* from being placed on any type of disciplinary action or from being suspended from school. (T pp 46-47)

25. *Ms. J* recommended *Student's* IEP team continue addressing *Student's* disruptive behaviors and academic struggles with a behavior plan that focuses on and rewards positive behaviors. She explained that, "His behavior in the classroom should be evaluated for a baseline of appropriate behaviors. Based on this baseline, time increments can be used." (Pet Exh G, p 14) She noted that negative behaviors should be ignored, with little consequences involving as little attention as possible.

26. *Ms. J* noted, "*Student* may benefit from sitting in close proximity to students who model appropriate classroom behaviors." (Pet Exh G, p 15) She recommended *Student* "would likely benefit from structured or peer activities that allow him to excel," such as being paired with a younger child whom *Student* could help. (Pet Exh G, p 17) Additionally, "*Student* may need encouragement to learn ways of handling social situations appropriately and successfully without conflict." Role-playing was a method of practicing these skills. (Pet Exh G, p 17) *Ms. J* encourages teachers (and parents) to create opportunities for appropriate behavior to occur, such as *Student* can assist in classroom demonstrations. (Pet Exh G, p 14)

27. When *Ms. J* evaluated *Student* and made recommendations regarding his treatment, a 1:1 assistant was not being considered. (*Parent* testimony) Nevertheless, *Ms. J's* recommendations are still helpful in determining what the best learning environment is for *Student*.

28. After the end of the 2009-2010 school year, *Parent* asked *Ms. JS* to assist him in getting his son's educational needs met. *Ms. JS* was a certified teacher from preschool through 12<sup>th</sup> grade in the "old school terminology" areas of behaviorally emotional, mentally challenged, autistic, and learning disabilities. She spent 35 years teaching in those areas in various different school systems in Arizona, and mostly in North Carolina. She recently retired from the Chapel Hill schools. Now, she works full-time as an advocate, conducts many evaluations, and works with neuropsychologists, psychologists, and neuro-psychiatrists. She has testified numerous times as an expert witness.

29. *Ms. JS* reviewed *Student's* IEPs from XXX County and Granville County, the minutes from the Respondent's IEP meetings, and some other records. Since *Parent* contacted her after school was over, *Ms. JS* did not observe *Student* in school, or evaluate *Student*.

30. *Ms. JS* compared the XXX County IEP for *Student* with the Respondent's IEP for *Student*. She thought they looked pretty much the same, as there were no direct changes to the goals and objectives, and no direct changes in modifications and accommodations, other than the one-on-one assistant being removed. (T pp 52-53)

a. When she reviewed the IEP minutes from Respondent's meetings and *Student's* IEP with Respondent, *Ms. JS* noticed that Respondent acknowledged the BIP did not need to be changed. (T pp 52-53)

b. While Respondent's IEP showed that *Student* had made progress on all the objectives, Respondent did not begin taking data on *Student* until May 24, 2010, after *Student* was suspended from school. *Ms. JS* questioned what data did Respondent use to consider changing *Student's* classroom setting from self-contained cross-categorical to the alternative behavioral school. Did Respondent base this decision primarily on those five days of data? She wondered whether Respondent followed *Student's* BIP from XXX County Schools. She commented that *Student* was not enrolled in Granville County schools for much time for the BIP to be implemented from April 12, 2010 until June 8, 2010.

31. *Ms. J* felt there needed to be short implementation of times in for documenting *Student*. (T p 54) In contrast, Respondent's data from May 24, 2010 until June 8, 2010, showed *Ms. JS* a "pretty big, uneven chunk of time to gather a whole lot of data." (T pp 54-55) *Ms. JS's* review of the data, including the suspension for the incident on the playground, made *Ms. JS* think:

[S]omething was not right or this maybe wouldn't have happened. What that was only can be guessed at this point, but there was something that wasn't meeting his [*Student*] needs, maybe proximity. Maybe it had to do with the more intensive behavior plan.

(T p 54) She explained that, "I'm thinking something is not meshing for this kid, because if it were, he would be doing okay." (T p 55) Further, the current IEP said *Student* was making progress, yet they [Respondent] are talking about placing him in a more restrictive setting. That didn't make sense to her. (T p 55)

32. *Ms. JS* noted that there was a pretty big difference in the amount of time, the role, and availability of the 1:1 assistant to *Student* in XXX County schools versus the time, role, and availability of the 1:1 assistant with *Student* in Respondent's school. She questioned, but didn't know, if that was a reason *Student's* behavior escalated on the playground on May 5, 2010. (T p 55)

33. Based on her review, *Ms. JS* opined that, "[W]e haven't given the kid [*Student*] a chance. . . . We haven't given the school a chance to show what skills they have in working with his needs." (T p 56) She thought we should first look at what *Student* currently has, and how we can improve upon that, before we decide to transition *Student* in the fall to something more restrictive. (T p 56)

34. *Ms. JS* read that some of *Student's* teachers were having lengthy discussions with *Student* about his behavior. That is not something you do as a behavior specialist. Lengthy discussions feed into the behaviors, and the behaviors just escalate. As an educator, she questions if the interventions were appropriate. (T p 57) The XXX County BIP that Respondent was honoring, provided that *Student* would be seeing a guidance counselor. Yet, she did see any indication whether *Student* spent any time with the guidance counselor in Granville County schools. (T p 57)

35. *Ms. JS* also questioned whether *Student's* May 5, 2010 suspension led the IEP team to decide, on July 13, 2010, they would like *Student* to attend *the alternative*

*school*. What led to that decision, and why was that decision made. She would like to know what data was used to make that decision. Was it those five days of data? (T p 58)

36. *Ms. JS* concluded that *Student* needs a totally rewritten educational plan, because his current plan is not explicit enough. *Student* is entering fourth grade, yet there are no goals for his reading comprehension; they are all for skills, and they said his reading comprehension was fine. She had a hard time understanding that, if *Student* has to start working on blends. She would like to see a very explicit diagnostic plan, something like the Brigance Inventory that is very useful for a classroom teacher. She would like to see a team approach using a very strong behavior plan for *Student*, including many of the psychologist's recommendations.

37. *Ms. JS* opined that it's important for a student who is working on behavioral and emotional skills to be around regular performing peers so he can practice those skills. That person needs modeling, someone to prompt him, and someone to guide him.

38. *Ms. AM* is the Exceptional Children's Director for Granville County schools. Before coming to Granville County schools, *Ms. AM* was the Exceptional Children's Director, and an Administrator at the high school and at the middle school in Franklin County. Previous to that, she worked as a behavior specialist at an alternative school in Hoke County, an autistic specialist, a transition coordinator, and a teacher in a trainable handicapped class. She holds a Master's Degree in Administration and Supervision from East Carolina University.

39. *Ms. AM* explained that when *Student* transferred into Granville County schools, *Student* came with a current IEP from XXX County schools. Respondent held the May 10, 2010 meeting to finalize the transfer paperwork that it had received from XXX County. When *Parent* notified the front office that *Student* had a one-on-one assistant, Respondent contacted *the alternative school*, and had *T.C.*, a behavioral specialist, come out. (T p 72)

40. The IEP team in Granville County met on May 19, 2010 and amended *Student's* IEP. Because there were so many marked out lines on the IEP, *Ms. AM* asked *Ms. RW* to rewrite the amended IEP to make a neater, easier-to-read copy. *Ms. RW* rewrote the amended IEP to make a neater and more orderly copy, but did not make changes made to the IEP. Respondent attached the IEP that was "clearer to read" to the XXX County IEP.

41. At the May 19, 2010 IEP meeting, the IEP team removed transportation as a service, because *Student* no longer needed transportation. *Student* had transportation in XXX County schools, because he attended a day treatment facility there. XXX County assigned a behavioral specialist as a one-on-one to *Student* when *Student* transitioned from day treatment to EO Young Elementary school.

42. *Ms. AM* explained that *Ms. RW* and *Ms. S.* are *Student's* special education teachers at ABC Elementary. *AM* described how *Student* and *Ms. RW* "clicked. . .It just worked. . . She requires quite a bit of work out of him, and he does it. She is—they have a great rapport." (T p 74)

43. The classroom teachers documented daily, but not on the forms that Parent provided. At the May 19, 2010 meeting, the IEP team discussed *Student* being with his regularly developing peers. After observing *Student* for about one month, Respondent felt that the teacher, not a paraprofessional, was responsible for *Student*. *AM* noted that even *Ms. J*'s recommendation does not mention a paraprofessional. It says the teacher.

44. The IEP team removed *Student*'s 1:1 assistant, because *Student* spent the primary amount of his day with two special education teachers. Those teachers could redirect *Student*, teach *Student* social skills, and instruct *Student* when a behavior was inappropriate, and what he could do instead. (T pp 74-75) Behavioral Specialist *T.C.* spent time with *Student*, and indicated that *Student* just needs simple redirection during his transition times. *T.C.* is trained in that, and is in his fifth year of doing that. (T p 75) *Student*'s classroom teacher explained that *Student* "needs redirection from us. He needs to know that the teachers are in control of the classroom." (T p 76)

45. *AM* opined that the services Respondent is offering *Student* are better services than the services *Student* was receiving in XXX County, because two qualified special education teachers, not a paraprofessional, are redirecting *Student*, and teaching him social skills. You must train a paraprofessional, and it takes a good while to train a really good paraprofessional to be a behavior interventionist. (T pp 76-77)

46. *Ms. AM* noted that on May 19 2010, the IEP team made a "team decision" to amend *Student*'s IEP by changing the level of services provided to *Student*, from providing a 1:1 assistant the entire school day to providing 1:1 assistance to *Student* only during the transition times, such as lunch, PE, and recess. The IEP team's decision was the most appropriate decision, based on the data they had gathered, the information from *Student*'s teachers, and Mr. *T.C.*'s information. Parent was not pleased with the decision. (T p 78)

47. *Ms. AM* opined that she thought that suspending *Student* for choking another student was appropriate [punishment]. *Student*'s choking a child, and not responding to the one-on-one's intervention, or to his father's intervention was a severe act.

48. During the May 19, 2010 meeting, Parent told the team that he wanted a one-on-one assistant with *Student* during school, so *Student* would not face disciplinary actions. *Ms. AM* explained to Parent that the only behaviors that would be addressed by those seven consequences in the BIP were the behaviors that were addressed in the BIP. In other words, the BIP deals with verbal aggression, and inappropriate interaction with peers. Physically attacking a child becomes a severe episode that is not addressed in the BIP.

49. *AM* also showed page 21 of the Parents Rights Handbook to Parent during that meeting. Page 21 explains the school disciplinary policy used to suspend *Student*. Under that school policy, a principal has the right to implement board policy on a case-by-case basis, and discipline a child who has a disability, as is with their regular peers. They have the legal authority that a child [with a disability] is held to the same type of policies. (T pp 79-80, 81)

50. After the May 19, 2010 meeting, *Ms. AM* thought things were going well. She felt that changing *Student*'s [1:1] "assistant" to "assistance" ensured that *Student* had a

teacher who could redirect him during any transition. “We felt confident with that, and *Student* was doing well.” “. . . [H]e developed quite a rapport with *Ms. RW.*” (T p 83)

51. By letter dated June 1, 2010, *Ms. AM* responded to Petitioner’s claims in his contested case petition.

a. Petitioner’s first claimed that Respondent failed to implement the XXX County IEP and provide a 1:1 assistant. *AM* responded that *Parent* attended the IEP meeting, and signed the minutes indicating he was aware of the change from 1:1 assistant to “assistance” during transition times. The team discussed the need for *Student* to be involved in the regular education setting. Transition from a one-on-one to “assistance” is a step in the right direction. (T p 85)

b. Petitioner’s second and third claims were that Respondent’s administration refused to consider *Student*’s individual case, and the unique circumstances about *Student* and the choking incident, when it determined discipline for *Student*, a child with disabilities. *AM* responded that *Student* had only been suspended for two days while at ABC, and a total of 3 days in the complete year includ[ing] at XXX County and ABC. She informed *Parent* that the school principal has the authority to remove a child who violates the code of conduct; thus, the two-day suspension for choking on the playground was up to the principal. (T pp 85-86)

c. Petitioner’s fourth claim is that Respondent’s policy requiring proof of residency before starting school violated *Student*’s right to attend school and receive a free appropriate education. *Ms. AM* explained that the policy requiring proof of residency is not an IDEA issue.

52. *AM* noted that *Parent* has indicated that *Student* deals really well with male figures. The elementary teacher at *the alternative school* is a black male EC teacher who is highly trained in SED, reading, and math. *The alternative school*’s programming would support *Student*’s progress academically and behaviorally. The male teacher is trained to deal with all the things that *Student* seems to be experiencing. (T pp 92-94)

53. In addition, *Parent* and *Student* dealt really well with *G.C.*, *the alternative school*’s Director, when *G.C.* worked with *Student* at ABC. (T p 93-94) *AM* acknowledged that the 2010-11 school year would be the first year for an elementary program at *the alternative school*. *Student* would have minimal contact with the middle and high school students, because those are separate classes. In her professional opinion, *AM* thought that *the alternative school* elementary class would benefit *Student*. (T p 90-94)

54. At hearing, *AM* described ABC as a small rural school with a real family environment. She thought that the nice family environment was the reason *Student* liked ABC. Everybody there likes *Student* and speaks to him. (T p 96) *Student* attended ABC long enough to see improvement, but Respondent would like to see more. *AM* thought *Student*’s IEP at ABC was working.

55. Nonetheless, *AM* would like to see *Student*’s IEP implemented at *the alternative school* to “see how well [*Student*] can do when there are not other factors that distract him.” (T p 97) *AM* would like to see *Student* have the “opportunity to be in a really

small environment, move his academics forward, as well as teach him some behavioral self-monitoring skills,” so when *Student* moves back into the regular setting, he’s prepared and doesn’t fail. (T p 97)

56. *AM* noted that *Ms. J* suggested giving *Student* a chance to fail in the regular classroom setting first. (Pet Exh G) *Ms. AM* questioned why would you ever set up a child to fail, when you have the opportunity to have him succeed.

57. During cross-examination, *Ms. AM* acknowledged that the “data” upon which the IEP team relied, to move *Student* from a 1:1 assistant to “assistance” only during transition times, was neither written nor reflected in the IEP meeting minutes. *AM* noted that the minutes from the IEP meetings are summaries, not verbatim recitations, of the IEP meetings. *AM* explained that the bases for that decision were the verbal discussions and/or input from *Student’s* teachers during the IEP meetings. *Student’s* teachers did not file written reports with the IEP team. The teachers’ input included how they had to redirect *Student*, how they redirected *Student*, things that he said, and things that he did. (T pp 105-106)

58. “Assistance” during transition times means that the teacher and/or teacher assistant who accompanies *Student* during transition time, such as PE, lunch, recess, or between classes, can redirect *Student* if he needs redirection. Any other time, *Student* is in a classroom with a teacher who can redirect him. At no time, would *Student* be allowed in the hallway unsupervised. (T pp 106-07)

59. When questioned about *Student’s* two-day suspension from school, during cross-examination, *AM* reiterated that *Student’s* current BIP specifically states that the behavioral consequences in the BIP specifically apply to behaviors listed in the BIP. The BIP also states that should *Student* engage in other behaviors, especially more severe behaviors, then *Student* will be disciplined according to board policy. (T pp 112-114) *AM* elaborated that technically, by board policy, *K.T.* should have suspended *Student* for three days for his aggressive act of choking another student. However, *K.T.* considered *Student’s* situation of transition, and only suspended him for two days. (T p 112)

60. *AM* opined that *the alternative school* is more appropriate for *Student*, because it would provide *Student* with the opportunity to work more on his educational progress one-one-one, which is a big concern of Respondent. It offers *Student* training in behavioral skills for *Student* to implement when he returns to school. Since *Ms. RW* is on maternity leave, and will not return when school resumes on August 25, 2010, *AM* would rather place *Student* at *the alternative school*, and provide him an opportunity to succeed, instead of place him somewhere and see if he fails.

61. *Ms. AM* conceded that ABC could meet *Student’s* needs. Nevertheless, she still claimed that it is “in *Student’s* best interest [to attend the *the alternative school*]. *Ms. RW* will not be back until October.” (T p 117) *Student’s* teacher at *the alternative school* would be *Mr. D.* *Mr. D.* has been employed by Respondent for six years. He was a teacher in North Granville Middle School, where he received exemplary results. He was an interim assistant principal at West Oxford Elementary school last year. (T p 120) The 2010-2011 school year would be *Mr. D.’* first year teaching at Respondent’s *the alternative school*.

62. After the end of 4½ weeks at *the alternative school*, the IEP team would meet. If the team decided that *Student* was ready to return to ABC, then they could transition *Student* with half days at ABC for two weeks, half days at the alternative school, then move into three days full time at ABC. . . any type of transition that the team feels would be most beneficial for *Student*. (T pp 120-21) There are many alternatives, but it's based on *Student*. (T p 121)

63. As of the date of this hearing, *Student* was the only student enrolled in the elementary class at *the alternative school*. The class is designed to have five maximum students.

64. G.C. is a behavioral specialist with Respondent, and Director of Respondent's *the alternative school*. G.C. has held those titles since February 2010.

65. *The alternative school* consists of a middle school, high school, and now, elementary school. *The alternative school* is located beside M.P. Middle School. The elementary school is separated from the other two schools. The students go to lunch at M.P. Middle, and use some of the facilities at M.P., such as the gym, and outside field. A social worker will be coming to work with students at *the alternative school* on skills. This year, a PhD candidate will come into the school to work with students on literary skills, social skills, and specific reading skills. (T p 129)

66. *The alternative school* has locked doors from the outside, so that if they have visitors, the school can protect the students' identity.

67. *The alternative school* provides individualized instruction built on the curriculum of North Carolina, and several other states called, "Odysseyware." The individualized instruction is based "off the computer." (T p 129) We have assistance with that instruction, along with her, to engage the children in any form of academics they need. (T pp 128-29) *The alternative school* also uses programs like, "Read 180." G.C. has seen one student increase 200 points on the Lexile reading scale using Read 180. (T p 129) This year, they have the opportunity to use a program called, "Dibbles." Mr. Dickerson, the elementary school teacher, is trained on all these programs.

68. G.C. described how the elementary school at *the alternative school* is a new program. Respondent is introducing the elementary school, because she and her director saw a need for that program. They have elementary students whose behaviors are not what they should be, to be interactive in the public school system. (T p 130)

69. At *the alternative school*, G.C. and her staff work with positive behavior support or reinforcement. The staff gives self-support, "Atta boys," or tangible items, such as extra computer time or extra time with staff, if a student makes good grades, or accomplishes all of his daily goals. They do interactive skills like that, so the children can be successful in the social interaction part. (T pp 130-31) G.C. recommends suspension [of a student] only if there's been physical aggression that is harmful, or anything that breaks policy like weapons or tobacco. (T p 130)

70. G.C. explained that *the alternative school* could help *Student* with his reading issues by using the computer-based programs of Read 180 or System 44. With these

programs, a student uses the computer and his own academic workbook that is specialized for that program. System 44 goes down to the basic phonics level at the kindergarten level, while Read 180 covers topics all the way through high school. (T p 131)

71. *Student* would be interacting with the middle school students, possibly the sixth grade team. In her personal opinion, G.C. would like *Student* to learn how to respond appropriately one-on-one with other adults, before *Student* enters a situation where he does not know the replacement behaviors. She would like *Student* to master those skills before returning to the school setting, and therefore, have the ability to respond appropriately automatically. (T p 132)

72. Academically, Read 180 and System 44 automatically test the student's collection of data throughout the program, so when the student reaches a certain level, that test is automatically generated. They will keep statistics on how much time *Student* performs certain behavior during a short timeframes, i.e. during a 20-minute timeframe. A 20-minute time span allows time to see if the re-direction can work, if re-teaching can work, and see what can be done. (T pp 132-33)

73. In addition, *the alternative school* has a system to annotate any type of negative behavior at all. She can communicate with Parent by email, and has talked with Mr. D. about contacting Parent on a regular basis. (T p 134)

74. G.C. does not want to keep any children at *the alternative school* for a long time, because she thinks they can do more in a regular public school setting. She wants her students to prove they can get back and be fine. She agrees that a four and one-half trial period for *Student* is good. (T p 134) G.C. does not like one-on-one teaching, because she wants her students to be able to handle "their own stuff, instead of becoming self-reliant on someone else to tell them what to do." (T p 135)

75. On cross-examination, G.C. acknowledged that since *Student* has been taken "off the docket," she has no students enrolled in the elementary school at *the alternative school*.

76. G.C. noted that *Student* would benefit from *the alternative school*, because his reading level is low, and because behaviorally Parent didn't agree with what was going in school. She does not think the computer-based programs of System 44 and Read 180 could financially be offered at ABC at this point. She explained that a certified teacher would teach *Student* math based on the standard course of study with regular textbooks. G.C. indicated that they would work on *Student's* social skills through character building. (T pp 140-41)

77. During cross-examination, G.C. acknowledged that *Student* would retrieve his lunch from the lunchroom at M.P. Middle School, and bring his lunch back to his classroom with his teacher. *Student* will eat lunch by himself, unless other kids are enrolled in his class. She admits that "not very much" mainstreaming would take place for *Student* during the proposed four and one-half weeks at *the alternative school*. (T p 141)

78. During cross-examination, Parent asked G.C., "How does he practice appropriate skills if he does not have peers the same age he is?" G.C. responded that you

have to know something, in order to practice it. You have to be able to master it. The skill has to be taught and re-taught, and they can do role-play. (T p 141) G.C. opined that she would want her child to be with a certified and trained person, instead of a one-on-one assistant. (T p 143)

79. By letter dated August 9, 2010, *Ms. J*, *Student's* psychologist, explained how she had been seeing *Student* since October 28, 2009. She opined that *Student* is "capable of doing work at his grade level" given her prior evaluation of *Student*. She is aware however, that *Student* has been unable to remain in the regular classroom setting due to his behavior. *Ms. J* believes *Student* needs:

[A] high degree of structure and discipline; however, I also believe he should be given the opportunity to first fail in the regular school setting, given this is his father's preference. If A does not comply with school rules, I believe there should be some specific guidelines in place that would send him to the 'Alternative School.'

(Pet Exh G)

80. At the beginning of this hearing, Petitioner advised the parties and the Court, that it desired admission of a letter from *Ms. J* (Pet Exh G), as *Ms. J* was unavailable to attend the hearing. The undersigned allowed admission of *Ms. J's* letter without objection from Respondent.

81. *Ms. RW*, one of *Student's* special education teachers at ABC, was also unable to attend the contested case hearing as she was on maternity leave. At the end of all the evidence, Respondent moved an August 16, 2010 letter from *Ms. RW* into evidence. Petitioner objected as Respondent failed to give any notice to Petitioner or the Court that it intended to move *Ms. RW's* letter into evidence. Since Respondent could have advised Petitioner and the Court, at the beginning of the contested case hearing, that it desired admission of *Ms. RW's* letter, but Respondent failed to do so, *Ms. RW's* letter is hereby excluded from evidence, regardless of the probative value *Ms. RW's* letter may have had in this case.

### **CONCLUSIONS OF LAW**

**BASED UPON** the foregoing Findings of Fact and upon the preponderance or greater weight of the evidence in the whole record, the undersigned concludes:

1. The Office of Administrative Hearings has personal and subject matter jurisdiction of this contested case pursuant to applicable State and Federal laws. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder. The parties received proper notice of the hearing in the matter. To the extent that the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.

2. Petitioner has the burden of proof in this case. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed. 2d 387 (2005). The responsible party for the burden of proof

must carry that burden by a greater weight or preponderance of the evidence. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing."

3. Petitioner *Student* is a child with a disability pursuant to State and Federal laws. Respondent is the Local Educational Agency (LEA) responsible for providing *Student* a free and appropriate public education (FAPE) in the least restrictive environment (LRE).

4. The Individuals with Disabilities Education Act (IDEA) and corresponding federal regulations are the federal laws that apply to Petitioner's allegations that Respondent failed to provide *Student* with a free and appropriate public education. The controlling State law for students with disabilities is Section 115C, Article 9 of the North Carolina General Statutes and the corresponding State procedures.

5. The IDEA defines free appropriate public education as one that provides the child with the disability with personalized instruction and sufficient support services to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176 (1982); *In re Conklin*, 946 F.2d 306 (4<sup>th</sup> Cir. 1991); *Harrell v. Wilson County Schools*, 58 N.C. App. 260, 293 S.E.2d 687 (1982).

6. In Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 206 (1982) the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the IDEA. The Court provided:

First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Acts' procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more."

A determination that the District has failed either test is sufficient to support a determination that it did not provide an appropriate program. Hacienda La Puente Sch. Dist. Of L.A. v. Honig, 976 F.2d 487 (9<sup>th</sup> Cir. 1992)

#### First Claim – Failure to Implement IEP

7. Petitioner's first claimed that Respondent failed to implement the XXX County IEP and provide a 1:1 assistant. In this case, the preponderance of the evidence at hearing showed that Respondent complied with procedures set forth in the IDEA when it amended *Student's* IEP on May 19, 2010. The evidence further showed that placement in a separate resource classroom with support services only during transition times was reasonably calculated to enable *Student* to receive educational benefit.

a. The IEP team members agreed that *Student* needed a smaller classroom setting, and needed additional support and redirection, particularly with his behavior and social skills, while in that classroom setting.

b. Respondent's delivery of the support services in the classroom differed from the 1:1 assistant provided by XXX County Schools in that Respondent provided support services in the classroom through two special education teachers. Respondent's EC Director thought that the services Respondent was offering *Student* were better services than the services *Student* was receiving in XXX County, because two qualified special education teachers, not a paraprofessional, are redirecting *Student*, teaching *Student* social skills, and instructing *Student* when he behaved inappropriate and how he could behave appropriately. In comparison, a 1:1 assistant or paraprofessional would have to be trained how to deliver these services to *Student*.

c. Behavioral Specialist *T.C.* spent time with *Student*, and indicated that *Student* just needs simple redirection during his transition times. (T p 75) *Student's* classroom teacher explained at the May 19, 2010 IEP meeting that *Student* "needs redirection from us. He needs to know that the teachers are in control of the classroom." (T p 76)

d. EC Director *AM* thought *Student's* IEP at ABC was working as *Student* made improvements, although *AM* thought *Student* could make more improvements.

e. *Ms. JS* even opined that they had not given *Student* and had not given Respondent a change to show what skills Respondent has in working with *Student's* needs. *Ms. JS* recommended that we first look at what *Student* currently has, and how we can improve on that, before we decide to transition *Student* into something more restrictive in the fall. (T p 56)

8. While Respondent's delivery of support services to *Student* differed from XXX County's provision of support services, Respondent's delivery of support services to *Student*, through two special education teachers in the classroom, and assistance during transition times, still met the goals of *Student's* IEP. Respondent's delivery of support services to *Student* was reasonably calculated to enable *Student* to receive educational benefit.

9. A preponderance of the evidence at hearing demonstrated that Respondent provided a free appropriate education to *Student* when it amended *Student's* IEP and changed *Student's* placement from a cross-categorical setting to a separate setting for resource, and reduced the service of a 1:1 assistant all day to providing support services only during transition times.

10. Since Respondent never amended *Student's* IEP and changed *Student's* placement to "*the alternative school*," any issues regarding that suggested change of placement were not before the undersigned in this contested case.

### Second and Third Claims – Failure to Consider Individual Case Circumstances

11. Petitioner's second and third claims were that Respondent's administration refused to consider *Student's* individual case, and the unique circumstances about *Student*, his disabilities, and the circumstances surrounding the May 5, 2010 choking incident, when

it decided to suspend *Student* from school for 2 days for choking a student on the playground.

12. 34 CFR §300.530(a), known as the “unique circumstances” clause, provides:

[S]chool personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

13. 34 CFR § 300.530(b)(1) states that a school district may suspend a student with a disability who violates the district’s code of conduct for up to ten school days in a school year to the same extent that a student without disabilities would be suspended.

14. The preponderance of the evidence showed that Respondent was authorized under 34 CFR § 300.530(b)(1) to discipline *Student* for violating Respondent’s code of conduct on May 5, 2010 when *Student* choked another student on the playground. The evidence showed that *Student*’s BIP provided consequences for *Student*’s behaviors that were specifically addressed in the BIP, but that *Student*’s behavior would be subject to Respondent’s code of conduct disciplinary procedures if *Student*’s behavior was more severe. The preponderance of the evidence also showed that Respondent did not violate the “unique circumstances” clause, as Respondent suspended *Student* for two days, instead of the required 3 days, based on the unique circumstances of *Student*’s disability, and of the choking incident.

#### Fourth Claim – Proof of Residency Policy denied FAPE

15. Petitioner’s fourth claim is that Respondent’s policy requiring proof of residency before starting school violated *Student*’s right to attend school and receive a free appropriate education. The preponderance of the evidence proved that Respondent’s policy on proof of residency is not a proper claim to be considered under the IDEA.

16. Petitioner failed to meet its burden of proving that Respondent acted by substantial error and denied *Student* a free appropriate public education. Respondent acted lawfully and consistent with the Individuals with Disabilities Education Act when it changed *Student*’s placement and reduced services of providing a 1:1 assistant to services of providing assistance during transition times only. Respondent’s IEP and placement of *Student* was appropriate to address *Student*’s special needs so as to provide him with FAPE in the least restrictive educational environment.

### **DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned finds that Respondent’s IEP and placement of *Student* was appropriate to address *Student*’s special needs so as to provide him with FAPE in the least restrictive educational environment.

## **NOTICE**

In accordance with the Individuals with Disabilities Education Act (as amended by the Individuals with Disabilities Education Improvement Act of 2004) and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 et seq.) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing). . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices." The State Board, through the Exceptional Children Division, shall appoint a Review Officer who shall conduct an impartial review of the findings and decision appealed.

Inquiries regarding further requirements of appeal rights, notices and time lines, should be directed to the Exceptional Children's Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

This the 21st day of September, 2010.

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Melissa Owens Lassiter  
Administrative Law Judge